ORIGINAL

Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MARCIA LEE CARROLL, Petitioner, v. EDWIN CHARLES MOORE, Respondent.	)	No. 88-786 MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, EDWIN CHARLES MOORE, through his attorney, asks leave to proceed in forma pauperis and to file the attached Brief in Opposition to Petition for a Writ of Certiorari accordingly. The Respondent has previously been granted leave to so proceed in the Nebraska Supreme Court. The Respondent's attorney's Affidavit in support of this motion is attached hereto and incorporated herein by this reference.

EDWIN CHARLES MOORE,
Respondent

BY: Roberta S. Stick

ROBERTA S. STICK, of
LEGAL SERVICES OF SOUTHEAST NEBRASKA
Attorney for Respondent
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161

IN THE SUPREME COURT OF THE UNITED STATES

MARCIA LEE CARROLL,	)	No. 88-786
	)	
Petitioner,	)	
	)	
v.	)	AFFIDAVIT
	)	
EDWIN CHARLES MOORE,	)	
	)	
Respondent.	)	

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

ROBERTA S. STICK, being first duly sworn, deposes and states:

1. She is the attorney who represented EDWIN CHARLES MOORE in the appeal he took to the Nebraska Supreme Court from the judgment of the District Court of Lancaster County, Nebraska, at Docket 386, Page 210.

2. She is desirous of representing Respondent's interest regarding the Petition for Writ of Certiorari that has beeen filed in the matter herein.

3. The appeal referred to in Paragraph 1 herein was taken In Forma Pauperis.

4. A copy of the affidavit used to support the Motion to Proceed In Forma Pauperis is attached hereto, marked Exhibit 1, and incorporated herein by this reference.

5. She has had no contact with EDWIN CHARLES MOORE for the last year and an attempt to contact him at an address furnished to her by the Lancaster County Attorney's office was unsuccessful.

6. Although she has had no contact with EDWIN CHARLES MOORE regarding the Petition for Writ of Certiorari that has been filed herein, she believes EDWIN CHARLES MOORE would be desirous of her continuing to represent his interests.

7. She has no reason to believe that EDWIN CHARLES MOORE's financial situation at this time is any different than it was at the time he signed the Affidavit attached hereto.

Roberta S. Stick
ROBERTA S. STICK

SUBSCRIBED and SWORN to before me on this 7th day of December, 1988.

KAREN L. PICKETT
GENERAL NOTARIAL SEAL
STATE OF NEBRASKA
COMMISSION EXPIRES
OCT. 14, 1992

Karen L Pickett
Notary Public

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MARCIA LEE CARROLL, Plaintiff, vs. EDWIN CHARLES MOORE, Defendant.	) Docket 386	Page 210
	AFFIDAVIT	

STATE OF NEBRASKA)
)ss.
COUNTY OF LANCASTER)

EDWIN CHARLES MOORE, being upon oath first duly sworn, deposes and states:

1. That he is the Defendant in the above-entitled action for establishment of paternity.

2. That this Affidavit is made pursuant to Neb. Rev. Stat. §25-2301, et seq.

3. That because of his poverty, Defendant is unable to prepay the costs of filing an appeal of the decision in this matter to the Nebraska Supreme Court.

4. That Defendant's current assets consist of:

Cash	0
Checking account	None
Savings account	$3.00
Stocks or bonds	None
Real property	None
Personal property (clothing)	$100.00
Automobile (1972 Oldsmobile)	200.00

Exhibit 1

5. That he was unemployed from November, 1985 through April 28, 1986 when he became employed as a construction worker. He will earn $5.00 an hour and will work approximately 20 hours per week. While unemployed he resided with friends and relied upon them for his support. Since obtaining employment, he will pay 1/2 of the monthly rent at the residence where he resides or approximately $178.00 plus 1/2 of the utilities and food costs which will amount to approximately $100.00. In addition he is indebted to the Lincoln Clinic in the amount of approximately $300; Lincoln General Hospital in the amount of approximately $100 and owes Cengas over $200 for past-due bills which he will being paying on after he receives his first paycheck. in May, 1986.

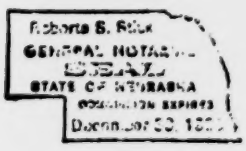
6. That he receives no other welfare or financial assistance.

THEREFORE, because of his poverty, he believes he is entitled to the redress sought and should be allowed to pursue his appeal in forma pauperis.

April 30 1986
Date

EDWIN CHARLES MOORE

SUBSCRIBED & SWORN to before me this 30th day of April, 1986.



Notary Public

IN THE SUPREME COURT OF THE UNITED STATES

MARCIA LEE CARROLL,	)	No. 88-786
Petitioner,	)	
v.	)	CERTIFICATE OF SERVICE
EDWIN CHARLES MOORE,	)	
Respondent.	)	

The undersigned hereby certifies that on the 5th day of December, 1988, one copy of Respondent's Brief in Opposition to Petition for Writ of Certiorari was served on Petitioner's counsel of record by mailing a copy, United States mail, postage prepaid, to Michael Thew, Deputy Lancaster County Attorney, County-City Building, 555 South 10th Street, Lincoln, Nebraska, 68508.

Roberta S. Stick

ROBERTA S. STICK, of
LEGAL SERVICES OF SOUTHEAST NEBRASKA
Attorney for Respondent
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161

No. 88-786

In the

Supreme Court of the United States

October Term, 1988

Marcia Lee Carroll,

Petitioner,

v.

Edwin Charles Moore,

Respondent.

On Petition for a Writ of Certiorari

to the Supreme Court of Nebraska

Respondent's Brief in Opposition

Roberta S. Stick, of
Legal Services of Southeast Nebraska
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161
Attorney for Respondent

QUESTIONS PRESENTED FOR REVIEW

Did the Nebraska Supreme Court err in holding that concepts of "fundamental fairness" and "meaningful opportunity to be heard" which are integral to the notion of due process make the right to counsel for indigent defendants in state-initiated paternity proceedings mandatory?

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The Respondent, Edwin Charles Moore, respectfully asks the Court to deny the Petition for Writ of Certiorari in this case, the opinion in which is reported at 228 Neb. 561 (1988).

STATEMENT OF THE CASE

The Respondent appealed to the Nebraska Supreme Court from the Lancaster County District Court order of August 19, 1985, denying his request for court-appointed counsel and the April 2, 1986 order finding paternity and directing payment of child support. Among the propositions of law presented to the Supreme Court by the Respondent were that an indigent defendant in a state-initiated paternity proceeding has a federal and state constitutional due process right to court-appointed counsel. Both Petitioner and Respondent cited to the court all the relevant cases supporting their respective positions regarding the issue of court-appointment of counsel. In a lengthy and well-considered opinion in which it examined case law from other jurisdictions, a unanimous Nebraska Supreme Court agreed with the position propounded by the alleged father. The court relied on general concepts of due process in imposing this obligation on Nebraska state courts, not specifically articulating whether its decision was based on state or federal constitutional grounds.

In reaching its decision, the court also gave consideration to the effect on due process of Nebraska statutes and case law concerning a right to a jury trial in paternity cases, the right to blood testing and the threat of incarceration if a person does not provide child support, when legally obligated to do so. It acknowledged that these all illustrate the need for counsel if the defendant is to have a meaningful opportunity to be heard and if paternity is to be determined in a fundamentally fair manner.

REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because the decision below does not involve a situation in which a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort.

1. The Nebraska Supreme Court, after an exhaustive review of all relevant authority, in a unanimous decision, chose to impose a burden on Nebraska state courts that is supported by state due process grounds and general concepts of due process as well as being within its supervisory authority.

The court in the case below makes no reference to whether its decision that an indigent defendant in state-initiated paternity proceedings has an absolute right to court-appointed counsel is based on state or federal constitutional grounds. Given this situation, this Court should decline to take jurisdiction. In Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54-55 (1934), cited in Michigan v. Long, 463 U.S. 1032 (1983), this Court stated:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for a decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it ...[I]f it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction....(citations omitted).

Long considered the issue of whether the Supreme Court should decline to take jurisdiction in a case that is alleged to rest on adequate and independent state grounds, concluding that:

> ...we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

463 U.S. at 1043. In Long the Court was persuaded to accept jurisdiction because the Michigan state court decision presented

for review relied exclusively on its understanding of applicable federal cases. However, in the case below, the Nebraska Supreme Court relied on other state court decisions regarding the issue of appointment of counsel for an indigent defendant in a paternity case in reaching its determination. There are no applicable federal cases. And the Nebraska Supreme Court opinion relies on general concepts of due process in concluding there is a right to court-appointment of counsel.

The state court decisions referred to and cited favorably by the Nebraska Supreme Court were decided on a variety of bases and give no guidance as to the exact principle upon which the opinion in the court below was based. They include Kennedy v. Wood, 439 N.E. 2d 1367 (Ind. App. 1982), in which the Indiana court made reference to the Fourteenth Amendment, but also cited state statutes recognizing the importance of counsel in various situations (such as exist in Nebraska); Corra v. Coll, 305 Pa. Super. 179, 451 A.2d 480 (1982), which relied on the federal due process clause, although referring to Hepfel v. Bashaw, 279 N.W 2d 342 (Minn. 1979), in which the Minnesota Supreme Court declined to decide the issue of appointment of counsel on due process and equal protection grounds, but instead found the right to counsel pursuant to the Court's supervisory power to ensure the fair administration of justice; State ex rel. Cody v. Toner, 8 Ohio St. 3d 22 (1983), in which the court based the right to counsel on state and federal due process grounds; and Lavertue v. Niman, 196 Conn. 403, 493 A.2d 213 (1985), also decided on state and federal due process grounds.

After its examination of these cases, the Nebraska Supreme Court acknowledged the confusion as to the foundation on which the indigent paternity defendant's right to counsel is grounded and affirmed its commitment to appoint counsel for indigent defendants in state-initiated paternity proceedings based on concepts of fundamental fairness or the court's supervisory authority rather than specific federal or state constitutional grounds. The court first stated:

Although all of the cases are not in agreement, we

> believe the better rule is that due process requires that an indigent defendant in a paternity procedure be furnished appointed counsel at public expense.

228 Neb. at 577. It later went on to conclude that:

> The concepts of "fundamental fairness" and "meaningful opportunity to be heard" which are integral to the notion of due process make the right to counsel mandatory .

Id. at 579.

The Nebraska court also had the opportunity to examine an ample body of case law in which state courts have decided that the right to court-appointed counsel for an indigent paternity defendant rests on state due process constitutional grounds. See Toner and Niman, supra. See also State ex rel. Graves v. Daugherty, 266 S.E. 2d 142 (W. Va. 1980); Madeline G. v. David R., 467 N.Y.S. 2d 271 (Fam. Ct. 1979); Salas v. Cortez, 593 P.2d 226 (Cal. 1979); Reynolds v. Kimmons, 569 P. 2d 799 (Alaska 1977); Artibee v. Cheboygan Circuit Judge, 243 N.W. 2d 248 (Mich. 1976). Substantiation for the decision in the case below can rest on the Nebraska Constitution's due process clause, as well as general concepts of due process.

Given the ambiguity surrounding the basis of the Nebraska Supreme Court decision, the exhaustive analysis of cases presented to the court below for its review, existing case law justifying a right to counsel on state due process grounds, and the Nebraska court's demonstrated willingness to appoint counsel as a matter of fundamental fairness, this Court should decline to exercise jurisdiction in the matter herein.

2. Unique features of Nebraska law make it inappropriate for the Supreme Court to use the case below as the cornerstone to determine whether federal constitutional law requires that an indigent defendant in a state-initiated paternity action has a right to court-appointed counsel.

The Nebraska Legislature has promulgated some unique statutes governing paternity proceedings and affording defendants certain protections in such actions. For example, Nebraska statutes regarding blood tests require that the parties involved are to "submit to genetic testing to be performed on blood or any other appropriate tissue." Neb. Rev. Stat. §43-1414 (Reissue 1984) (emphasis supplied). Thus, the testing order can go beyond blood group testing to require more sophisticated tissue typing. Moreover, the tests are not merely exclusionary but "[t]he results of the tests, including statistical probability of paternity, shall be admissible evidence and shall be weighed along with other evidence of paternity." Neb. Rev. Stat. §43-1415 (Reissue 1984). Statutes in other states such as Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington and Wyoming provide for blood testing in paternity cases, but do not provide a right to more sophisticated scientific testing, as does Nebraska.

In the case below, the Nebraska court focused on the important role played by blood testing in paternity determinations. It cited with favor an ABA-AMA joint report recommending a seven tier testing system to determine probability of paternity and noted that the facts in the case before it gave no indication that HLA testing (part of the seven tier system) had been performed. 228 Neb. at 568. Cases relied on by the Nebraska court as substantiation for its determination regarding a right to counsel also referred to the ABA-AMA joint report (see Kennedy, supra) and focused on the importance of a right to blood grouping tests and the need for counsel to assert such right and

assist in increasingly complex litigation resulting from the use of scientific evidence (see Toner, and Lavertue, supra).

The Nebraska Supreme Court cited Nebraska case law and statutes that describe paternity actions as penal in some aspects and that impose criminal sanctions on a person who is legally obligated to provide proper support for a child and intentionally does not. See Lockman v. Fulton, 162 Neb. 439,443, 76 N.W. 2d 452, 455, (1956); Neb. Rev. Stat. §25-2121 (Reissue 1985); §28-706(1) (Reissue 1985); and §43-1406 (Reissue 1984). This potential threat of imprisonment led the Nebraska Supreme Court to conclude that due process necessitated appointment of counsel.

While trial in paternity actions is generally like that of other civil proceedings, Nebraska statute provides the defendant is not entitled to a jury trial unless he requests it. Neb. Rev. Stat. §43-1412 (Reissue 1984). In addition, under Nebraska law, the testimony of the mother is not sufficient in and of itself to support a finding that the putative father is actually the father. It must be corroborated. See Neb. Rev. Stat. §43-1412 (Reissue 1984) and Gregory v. Davis, 214 Neb. 408, 334 N.W. 2d 1 (1983). Other states, such as Florida, Kansas, New York, South Carolina, Utah and Washington, make no provision for a jury trial in paternity matters under any circumstances. By affording the defendant a qualified right to jury trial, the Nebraska Legislature has reinforced the importance of counsel to the alleged father. First, the defendant would be unlikely to know of his right to jury trial unless so advised by a person knowledgeable in the law and secondly, the alleged father who did assert his right to jury trial would certainly need assistance of counsel in order to present his case effectively in such setting.

All these peculiarities of Nebraska law buttress the importance of having an attorney available to advise a paternity defendant of his rights. Moreover the Nebraska Legislature has asserted its commitment to furnishing court-appointed counsel to indigents in other contexts by mandating that parents have counsel

in proceedings regarding termination of parental rights as well as other juvenile court matters involving abuse and neglect. Neb. Rev. Stat. §43-279.01 (Cum. Supp. 1986).

Given the unique features of Nebraska law regarding paternity proceedings, the necessity of counsel in order to assert rights afforded by Nebraska law and the legislative proclivity to appoint counsel for indigents, this Court should not use Carroll v. Moore as the vehicle to determine whether the due process clause of the United States Constitution mandates court-appointed counsel for indigent defendants in state-initiated paternity actions. In Nebraska and other states that have decided this issue, fundamental concepts of fairness and a meaningful opportunity to be heard would still require appointment of counsel.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BY:

ROBERTA S. STICK, of
LEGAL SERVICES OF SOUTHEAST NEBRASKA
825 Terminal Building
Lincoln, Nebraska 68508
(402) 435-2161
Attorney for Respondent,
EDWIN CHARLES MOORE

Dated: December 5, 1988